

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Retention by Broadcasters of)	MB Docket No. 04-232
Program Recordings)	

**COMMENTS OF
BONNEVILLE INTERNATIONAL CORPORATION**

I. INTRODUCTION.

Bonneville International Corporation (“Bonneville”), pursuant to Section 1.415 of the Commission’s rules, hereby submits these Comments in response to the *Notice of Proposed Rulemaking* (“*NPRM*”) issued in the above referenced docket.¹ Although Bonneville shares the Commission’s and other broadcasters’ concerns with respect to obscene and indecent broadcast programming, Bonneville opposes the particular proposal set forth in the *NPRM* that would require all broadcasters to record and then retain the recordings of all the programming they air between the hours of 6 a.m. and 10 p.m. for some specified period of time such as 60 or 90 days. In Bonneville’s view, the *NPRM* proposal is overbroad, unnecessary, overly burdensome and would have a chilling effect on broadcasters’ First Amendment rights.

II. STATEMENT OF INTEREST.

Bonneville is a diversified media company that operates a full service television station and 34 radio stations in markets across the country.² Bonneville stations have a long record of

¹ *Retention by Broadcasters of Program Recordings*, MB Docket No. 04-232, *Notice of Proposed Rulemaking*, FCC 04-145 (rel. July 7, 2004).

² All of the stations operated by BIC are licensed to a BIC-affiliated company, Bonneville Holding Company.

outstanding service to the public and consistently win awards for their commitment to local news and programming excellence.³

Bonneville's commitment to service to the local community is likewise well established. In 2003 Bonneville stations devoted nearly 3600 hours of air time to public affairs programming, public service announcements, and special community projects.⁴ In recognition of these efforts, Bonneville radio stations have won numerous NAB Crystal Awards – the highest industry honor for community service.⁵

III. THE PROPOSED RECORDING AND RETENTION RULES ARE OVERBROAD.

Bonneville is proud of its broadcast record and strives to maintain and enhance its demonstrated high level of excellence and integrity in programming. Bonneville is not alone among broadcasters in its commitment to local news, high quality programming and community service.⁶ Bonneville recognizes, however, that there are a few broadcast licensees that on occasion have pushed the limits on broadcast indecency standards.⁷ Nevertheless, the actions of

³ In 2003 alone, WTOP-AM/FM (Washington, D.C. metropolitan area) was awarded: Regional Edward R. Murrow Awards for Overall Excellence, Spot News, Best News Series, and Best Web Site; Chesapeake Associated Press Awards for Outstanding News Operation, Outstanding Spot News Reporting, Outstanding News Series, Outstanding Coverage of a Continuing Story, Outstanding Sports Feature, Outstanding Specialty Reporting and Best Newscast; and has been nominated for the 2004 National Edward R. Murrow Award for Best Radio News Website. In Chicago, Bonneville's WNND(FM) was named the "Station of the Year" in 2000 and has also been awarded with the Silver Dome Award for Newscasts, Public Affairs Programming, and Public Service Announcements by the Illinois Broadcasters Association. In Salt Lake City, Bonneville's KSL(AM) has been honored by the Utah Broadcasters Association and the Utah Headliners Chapter of the Society of Professional Journalists with numerous awards for its local news programming, including awards for Best Newscast, Best Breaking News Story, Best News Series, and Best Sports Event Broadcast. In 2004, KSL(AM) won two National Edward R. Murrow awards.

⁴ BONNEVILLE INTERNATIONAL CORPORATION, 2004 VALUES REPORT (2004).

⁵ Bonneville stations have won 18 of the 141 NAB Crystal Awards for outstanding community service presented since 1992.

⁶ Broadcasters' commitment to public service to their communities across the industry is also well documented. According to the NAB, local broadcasters invested \$9.6 billion in their local communities in 2003. *NAB National Report on Local Broadcasters' Community Service* (June 2004).

⁷ Indeed, Bonneville submits that the most significant concern in this area should be with respect to cable programming and, increasingly, satellite radio.

these stations do not justify imposing burdensome rules that would require *all* broadcasters, including religious and educational broadcasters and the thousands of commercial broadcasters that have never received an indecency complaint, to tape and retain 16 hours of their programming daily just in case a viewer or listener might submit an indecency complaint against the station and the Commission would desire additional information to prosecute it. Most broadcasters are responsible stewards of the radio spectrum that has been entrusted to them, and the indecency concerns do not justify imposing an unnecessary and burdensome program recording and retention requirement on *all* broadcasters. At most, any program record keeping requirement should only be considered for circumstances where a station has previously been subject to an adverse indecency finding.

IV. THE PROPOSED RULES ARE UNNECESSARY FOR EFFECTIVE ENFORCEMENT OF THE COMMISSION'S INDECENCY RULES.

While complaints regarding obscene or indecent broadcasting should be taken seriously, the Commission does not need to supplement its current enforcement system with additional layers of rules in order to deter indecent programming. Although the Commission requires a complainant to provide sufficient information regarding the relevant programming to place it in context, the Commission has ruled that the amount of information need not be extensive.⁸ A tape or transcript of the programming is not required. Indeed, in cases in which a licensee can neither confirm nor deny the allegations in a complaint of indecent broadcasts, the Commission has held that the broadcasts have occurred.⁹ One need only look at the recent significant enforcement activity by the Commission in the indecency area to conclude that the existing procedures do not unduly restrict Commission enforcement. Thus, the Commission's indecency

⁸ *NPRM* at ¶ 4 and n.7.

⁹ *Id.* at ¶ 7 n.9.

enforcement procedures have proven to be effective without the need to burden compliant broadcasters with a program recording and retention requirement.

In addition, it must be recognized that the number of indecency complaints generally – and particularly those that have been dismissed because of a lack of a tape, transcript, or significant excerpt – is relatively small in comparison to the number of television and radio stations licensed nationwide and the number of hours they air programs. Specifically, the Commission has licensed over fifteen thousand television and radio stations.¹⁰ Between the years 2000 and 2002, these stations cumulatively broadcast millions of hours of programming during the period from 6 a.m. to 10 p.m.; and the Commission received 14,379 indecency complaints covering 598 programs.¹¹ Of these 14,379 complaints, the Commission denied or dismissed fewer than 1.2 percent of them (169) because of the lack of a tape, transcript or significant excerpt.¹² Given that adequate information to adjudicate indecency complaints has been available more than 98 percent of the time, it is not reasonable for the Commission to impose this burdensome new regulation.

Moreover, a program recording and retention requirement is particularly needless given the widespread availability of recording technologies to television viewers and radio listeners. Viewers and listeners already have a variety of methods by which they can record programming. The plethora of inexpensive VCRs, DVRs (*e.g.*, TiVo), and tape machines in today's marketplace allow an easy and affordable means to record programming. In fact, in the case of recent complaints regarding Janet Jackson's performance at the Super Bowl or episodes of *Will*

¹⁰ According to the Commission, there are 13,486 AM, FM and FM Educational radio stations and 1,747 UHF and VHF television stations. *See Broadcast Station Totals as of June 30, 2004, News Release* (rel. Aug. 20, 2004).

¹¹ *NPRM* at ¶ 6 n.8, citing letter from Chairman Michael K. Powell to the Hon. John D. Dingell, March 2, 2004.

¹² *Id.*

and *Grace* and *Buffy the Vampire Slayer*, the Commission had little difficulty obtaining tapes of the relevant programs to review.¹³

V. THE PROPOSED RULES ARE OVERLY BURDENSOME.

The Commission's proposal to require that broadcasters make and retain recordings of 16 hours of their programming daily is neither an efficient nor a reasonable way to accomplish the goal of enforcing restrictions on obscene or indecent broadcast programming. The proposal will financially burden all broadcasters, especially smaller broadcasters, due to the cost of: (1) recording and storing the most recent 1,440 hours (or more) of broadcast programming; and (2) perhaps more costly, hiring and training staff employees to comply with the recording and retention requirements. If the Commission were to adopt the proposed rule, it also would need to set additional regulatory standards governing such matters as how often licensees must check their recording and retention equipment (weekly, daily, or hourly), how long is a reasonable time for a licensee to repair or replace malfunctioning equipment, etc. It makes little sense to introduce such a whole new area of regulatory requirements and their attendant costs across the industry.

VI. THE PROPOSED RULES MAY HAVE A CHILLING EFFECT ON BROADCASTERS' FIRST AMENDMENT RIGHTS.

Before the Commission adopts the proposed rules, it must analyze whether its proposed program recording and retention rules will have a chilling effect on broadcasters' First Amendment rights. The Supreme Court has ruled that a content-neutral regulation affecting speech will be sustained only "if it furthers an important or substantial governmental interest; if

¹³ See, e.g., *KSAZ License, Inc.*, File No. EB-03-IH-0256, *Memorandum Opinion and Order*, FCC 04-197 (rel. Aug. 9, 2004); *Complaint Against Various Broadcast Licensees Regarding Their Airing of The UPN Network Program "Buffy The Vampire Slayer" on November 20, 2001*, File No. EB-03-IH-0407, *Memorandum Opinion and Order*, FCC 04-196 (rel. Aug. 9, 2004).

the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”¹⁴ As described previously, the proposed rules would apply to all broadcasters, including religious and non-commercial educational broadcasters, as well as broadcasters that have never been the subject of an indecency complaint, and thus do not represent the least intrusive means by which any legitimate governmental interest may be satisfied. Moreover, knowing that the FCC could ask for a tape of any programming broadcast between 6 a.m. and 10 p.m. in the previous three months for any reason whatsoever could affect a broadcaster’s willingness to broadcast entertainment or community service programming or the expression of opinions on community issues for fear that it might offend a viewer or listener. Certainly, it is foreseeable that, if the Commission were to adopt the recording and retention rules, parties not interested in filing indecency complaints could attempt to compel production of tapes for private law suits or other purposes not intended by the Commission. Thus, legitimate concerns as to these possibilities will result in a chilling effect on broadcasters’ First Amendment rights.

¹⁴ *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Indeed, the Commission's proposed rules should be subject to higher Constitutional scrutiny because they are not content-neutral, as the proposed recording and retention requirements will be used to enforce content-related rules governing indecency, children's television commercial limits, and sponsorship identification. *NPRM* at ¶ 8.

VII. CONCLUSION.

For the reasons set forth above, Bonneville does not support the Commission's proposal to require broadcasters to make and retain recordings of their programming.

Respectfully submitted,

BONNEVILLE INTERNATIONAL CORPORATION

By: _____/s/_____
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President and Chief Executive Officer

August 27, 2004